



waterrights DNR <waterrights@utah.gov>

Fwd: Response to Water Horse Resources' Supplemental Information (Water Right No. 41-2747)

1 message

Teresa Wilhelmsen <teresawilhelmsen@utah.gov>
To: waterrights DNR <waterrights@utah.gov>

Fri, Mar 15, 2019 at 4:37 PM

----- Forwarded message -----

From: **Gilbert, Graham** <ggilbert@swlaw.com>
Date: Fri, Mar 15, 2019 at 3:42 PM
Subject: Response to Water Horse Resources' Supplemental Information (Water Right No. 41-2747)
To: TERESA WILHELMSSEN <teresawilhelmsen@utah.gov>

Teresa,

This afternoon I filed a hard copy with your office of the Upper Yampa Water Conservancy District's and the Colorado River District's response to the supplemental information submitted by Water Horse Resources. This relates to Water Right No. 41-3747 (Application No. A81080). I have attached a scanned copy of the letter for the Division's electronic records.

Best,

Graham Gilbert

15 West South Temple Street, Suite 1200, Salt Lake City, Utah 84101

Direct: 801.257.1911 | General: 801.257.1900 | Fax: 801.257.1800

E-mail: ggilbert@swlaw.com | Web: www.swlaw.com

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Teresa Wilhelmsen, P.E.
Assistant State Engineer - Applications and Records

Department of Natural Resources
Division of Water Rights
1594 West North Temple, Suite 220
PO Box 146300
Salt Lake City, Utah 84114-6300
www.waterrights.utah.gov

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801-537-3119 office

teresawilhelmsen@utah.gov

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YWCD's and CRD's Response to Water Horse's Supplemental Info.pdf

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Gateway Tower West
15 West South Temple
Suite 1200
Salt Lake City, Utah 84101-1547
801.257.1900
www.swlaw.com

Graham J. Gilbert
(801) 257-1911
ggilbert@swlaw.com

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March 15, 2019

VIA HAND DELIVERY

Mr. Kent Jones, P.E.
State Engineer
Utah Division of Water Rights
1594 West North Temple, Suite 220
Salt Lake City, UT 84114-6300

Re: Upper Yampa District's and Colorado River District's Response to Supplemental Information Filed by Water Horse Resources, LLC, Application No. A81080 (Water Right No. 41-3747)

Dear Mr. Jones:

I write on behalf of the Upper Yampa Water Conservancy District ("**Upper Yampa District**") and the Colorado River Water Conservation District ("**Colorado River District**") (together, the "**Districts**"). Each District filed a timely protest in opposition to Water Horse Resources, LLC's ("**Water Horse**") Application No. A81080 (Water Right No. 41-3747) ("**Application**"). Each District appeared at the November 7, 2018 hearing regarding this Application ("**Hearing**") and provided testimony opposing the Application. On December 10, 2018, the State Engineer requested additional information from Water Horse. Water Horse replied on February 8, 2019 ("**Supplemental Letter**"). This letter responds to Water Horse and provides additional information in opposition to the Application.¹ The Supplemental Letter is non-responsive to the State Engineer's request for information, is misleading, and fails to satisfy the requirements of sections 73-3-8 and 73-3a-108 of the Utah Code. Therefore, the Districts respectfully request that you deny this Application.

1. This Application Should be Denied Because it is Speculative

Before responding to Water Horse's Supplemental Letter, it is important to highlight that this Application should be denied because it is speculative. Water Horse is not a water user, it does not have existing contracts with any water users, and the Application does not specifically

¹ The Districts join with and support many of the arguments made by other protestants, particularly those of the Federal agencies.

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identify the claimed water's type of use or its place of use. The State Engineer has previously denied similar applications. For instance, he rejected Western Water, LLC's application as speculative because "the only proposed beneficial use for the water was a plan to sell it to others. Indeed, the applicants had no lands, facilities, customers, or contracts." *Western Water, LLC v. Olds*, 2008 UT 18, ¶ 8. 184 P.3d 578 (internal quotation marks omitted); *see also* Reissued Memorandum Decision, In the Matter of Application Numbers 55-9399 (A72027); 57-10282 (A73473); and 59-5606 (A72026) (Mar. 17, 2004). The Application is also certain to be denied under Colorado's anti-speculation doctrine. *See Pagosa Area Water & San. Dist. v. Trout Unlimited*, 170 P.3d 307, 314-315 (Colo. 2007), as modified (Nov. 13, 2007) (*en banc*) ("For a private entity to meet [the burden of demonstrating intent to appropriate,] it must have contractual commitments for any appropriations that are not planned for its own use, or the application will fail as unduly speculative.").

2. Colorado Should Decide Whether Any Portion of its Upper Colorado River Basin Compact Apportionment May be Used for This Application

The Colorado Water Conservation Board's July 10, 2018 letter does not agree to debit depletions associated with this Application from Colorado's apportionment under the 1948 Upper Colorado River Basin Compact ("**Upper Basin Compact**"). Rather, the letter states that, if Water Horse satisfies two significant conditions, the Application may be accounted for under Colorado's apportionment. The conditions require Water Horse to obtain approval for this project pursuant to Colorado's Water Rights Determination Act and the Upper Colorado River Basin Commission must determine that the Application falls within the provisions of the Upper Basin Compact. Water Horse has not satisfied these significant conditions.

Water Horse's interpretation of Article IX(a) of the Upper Basin Compact acknowledges that water must be available for the Application under Colorado's Upper Basin Compact apportionment. Colorado is in the best position to determine if some of its apportionment may be used by Water Horse. As described above, Colorado has not made this determination. The Division should defer action on this Application until Colorado expressly agrees that this Application may be accounted for under Colorado's apportionment and the Upper Colorado River Commission has affirmatively confirmed such a determination. Colorado is extremely unlikely to make such a determination because, as discussed previously, Water Horse cannot satisfy Colorado's strict anti-speculation doctrine. Furthermore, as described below, Water Horse's proposal would not be consistent with the Colorado Water Plan.

Following a multi-year extensive public process, Colorado adopted its first ever statewide water plan in November 2015.² The plan sets forth "measurable objectives, goals, and actions by

² The Colorado Water Plan can be found at the following internet link:
<https://www.colorado.gov/pacific/cowaterplan/plan>

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which Colorado will address its projected future water needs”³ Chapter 8 of the Colorado Water Plan contains “the fundamental principles the parties to a new transmountain diversion should expect to address [and describes] seven principles to guide future negotiations between end users and basin-of-origin communities in the contemplation of any new transmountain diversion.”⁴ The proposed Water Horse project certainly would be a new transmountain diversion – thus, the Seven-Principles of Colorado’s Water Plan would apply to any review or approval of Water Horse’s project for use within Colorado.

The key element of the Water Plan’s Seven-Principles for new supply is set forth at Principle 4 – which states that a collaborative program is needed to protect *existing uses and some reasonable increment of future development* against the threat of a Colorado River compact curtailment. Principle 4 very clearly states that the program will not provide protection from curtailment for a new transmountain diversion, such as the Water Horse proposal.

Colorado, and her sister-states in the Upper Basin, took a major step forward in the development of the program to protect against compact curtailment when they approved the Upper Basin Drought Contingency Plan (“DCP”) in December 2018. The Upper Basin DCP includes a Demand Management Agreement, which establishes the framework for a program intended to avoid or mitigate the risk of involuntary compact curtailment and to enhance the certainty and security of the Upper Basin’s Colorado River water supply.⁵ Thus, the Demand Management component of the Upper Basin’s DCP effectively serves within Colorado to satisfy Principle 4 of Colorado’s Water Plan. Water Horse’s proposal is at odds with Colorado’s stated water policy because, as specified in Principle 4 of Colorado’s Water Plan, a Demand Management Program within Colorado will not provide compact curtailment protection for a new transmountain diversion project, such as the Water Horse proposal.

3. Article IX(a) of the Upper Basin Compact is Not a Loophole Around Application of Utah Law

Article IX(a) does not prevent Utah from reviewing export applications and protecting in-state water users. Water Horse claims that Article IX(a) requires approval of its Application, so long as the depletions fall within Colorado’s Upper Basin Compact apportionment. But Water Horse ignores the last sentence of Article IX(a), which states that proposed exports “shall be subject to the rights of water users, in a State in which such reservoir or works are located, to receive and use water, the use of which is within the apportionment to such State by this Compact.”

³ Colorado Water Plan, Executive Summary at 1.

⁴ *Id.* at 10.

⁵ See <http://cwcb.state.co.us/Pages/CWCBHome.aspx>, and

http://cwcb.state.co.us/Documents/ShortTermHomePage/20181008_DCP%20Agreements%20Final%20Review%20Draft.pdf

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Utah's water laws, specifically Title 73, Chapter 3, Appropriation, and Title 73, Chapter 3a, Water Exports, are designed to protect water users' rights to receive and use water. In other words, regardless of any action by the State of Colorado (which has not occurred), the Upper Basin Compact recognizes that Utah law must also be applied, and the Utah Code provisions cited above give effect to the last sentence of Article IX(a).

4. The Application Does Not Satisfy the Requirements of Section 73-3-8

Water Horse has failed to demonstrate a reasonable belief that this Application satisfies the requirements of section 73-3-8 of the Utah Code.

a. Unappropriated Water

Utah's water law is designed to balance new appropriations with protection of existing water rights. It does this, in part, by requiring would be appropriators to demonstrate a reason to believe that their application meets the requirements of section 73-3-8(1) of the Utah Code. While the reason to believe standard puts a "fairly low burden" on an applicant, the applicant must still come forth with evidence to meet this burden. *HEAL Utah v. Kane Cnty. Water Cons. Dist.*, 2016 UT App 153, § 21, 378 P.3d 1246. If protestants produce evidence that is "compelling enough to undermine the reasonableness of the assertion[s]" in the application, the State Engineer should reject the application. *Id.* (internal quotation marks omitted).

To demonstrate reason to believe there is unappropriated water in a proposed source, the applicant must show that the available water supply exceeds the demands of existing water rights. *Little Cottonwood Water Co. v. Kimball*, 289 P. 116, 118-119 (Utah 1930). In *Little Cottonwood Water*, this was demonstrated by showing unappropriated water during spring-time peak flows. *Id.* at 119. But the showing required varies based on each application and this Application presents a unique case. It proposes a diversion rate of 76 cfs and an annual diversion quantity of 55,000-acre feet. To achieve this annual volume using this diversion rate, water will have to be diverted 24 hours per day, 365 days per year. Because Water Horse must divert at a constant rate, it needs to show – on a daily basis – that physically and legally available water exceeds existing demands, including flows for endangered fish recovery. As explained below, failure to divert at a constant rate impacts project yield, revenue, and economic feasibility.

Water Horse relies on the following three documents as the foundation for its analysis that there is unappropriated water in the Green River: (1) Reclamation's 2007 Water Availability

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Analysis⁶; (2) the Williams and Weiss Report⁷; and (3) the Boyle Report.⁸ As explained below, none of these documents demonstrate that there is unappropriated water available for the constant rate of diversion that this project requires. In its 2007 Water Availability Analysis, Reclamation identified 165,000-acre feet of water available in Flaming Gorge Reservoir. Water Horse repeatedly refers to this analysis to support its claim that unappropriated water is available. But at the Hearing, Reclamation testified that this water is no longer available. Water Horse offers no explanation why, despite Reclamation's testimony, this water is still available in Flaming Gorge Reservoir. Moreover, Water Horse does not have a Reclamation Water Service Contract that entitles it to use this water.

Both the Williams and Weiss Report and the Boyle Report estimate water availability for diversion by subtracting the *annual* volume required for endangered fish flows from the *annual* flow available in the Green River (based on USGS stream gage data). This very general, mass balance analysis is insufficient to show that unappropriated water is available. These Reports fail to analyze daily and seasonal flow variability and drought. Because Water Horse's Application would require diversion of water at a constant rate, Water Horse must show that unappropriated water is available on a daily basis, or at least on a monthly basis. Water Horse's reliance on reports and studies that are dated or overly general fails to demonstrate that there is unappropriated water available in the Green River.

Water Horse argues, based on *HEAL Utah*, that the endangered fish recovery program does not create a "legal impediment to Water Horse's desired appropriation." Supplemental Letter, 6. This argument ignores the State Engineer's Green River Policy⁹, which applies to points of diversion above the Duchesne River, including Water Horse's. The Green River Policy requires bypass of flows required for endangered fish recovery. Green River Policy, 5. As a result, bypass flows for recovery of endangered fish present a legal impediment to Water Horse. Moreover, federal environmental permits will require maintenance of these flows.

b. Physical Feasibility

The supplemental engineering information provided by Water Horse fails to demonstrate a reasonable belief that this project is physically feasible. Exhibit F to the Supplemental Letter

⁶ Ltr. From R. Gold, Bureau of Reclamation to D. Ostler, Upper Colorado River Commission (Mar. 30, 2007) (Exhibit A to Water Horse's Supplemental Letter) (the "**2007 Water Availability Analysis**").

⁷ Williams and Weiss Consulting, LLC, Technical Memo re Green River Flow Availability (Nov. 2017) (Exhibit D to Water Horse's Supplemental Letter) (the "**Williams and Weiss Report**").

⁸ Boyle Engineering Corporation, Regional Watershed Supply Project Summary of Preliminary Findings (Jan. 2006) (Exhibit E to Water Horse's Supplemental Letter) (the "**Boyle Report**").

⁹ State Engineer's Policy Regarding Applications to Appropriate Water and Change Applications Which Divert Water From the Green River Between Flaming Gorge Dam, Downstream to the Duchesne River (Nov. 30, 1994) ("**Green River Policy**").

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does not contain a complete engineering study or set of engineering drawings for this project. Rather, the exhibit contains a hodgepodge of engineering documents that are years old and for different projects. To offer a few examples, Exhibit F includes select 2008 construction details for Million Conservation Resource Group's Regional Watershed Supply Project; a survey for points of diversion located on the Green River *in Wyoming*; and the design for an intake and pump station at Flaming Gorge Reservoir. Exhibit F undermines the physical feasibility of this project for another reason; it does not show a reservoir at the pipeline terminus. Water Horse plans to divert 76 cfs on a constant basis. It is not physically feasible to deliver water to customers at this rate. Because Exhibit F contains documents that are incomplete and for different projects, it fails to demonstrate *this project's* physical feasibility.

c. Economic Feasibility

Water Horse grossly underestimates the cost to build this project. In its Supplemental Letter, Water Horse states that the project will cost between \$860 million and \$1.1 billion to permit and construct. This estimate is significantly lower than other major water infrastructure projects. For instance, Colorado Springs' Southern Delivery System cost \$825 million to permit and construct. The Southern Delivery System was only 50 miles, which is significantly shorter than Water Horse's proposed 420-mile pipeline.¹⁰

Water Horse's economic feasibility analysis, located in Exhibit G to the Supplemental Letter, is based on an unrealistic timeline. It assumes that environmental permitting will be complete within 3 years and that the pipeline will be delivering water to customers in 5 years. At the Hearing, the BLM – which is likely to be the lead agency for NEPA permitting for the Application – estimated that permitting this project will take approximately 15 years. This longer timeline will result in significantly higher project costs.

Water Horse's economic feasibility analysis overestimates project revenues. Water Horse repeatedly argues that it is a junior water right that can be curtailed if it impacts existing water rights, endangered fish recovery, or reserved water rights. This argument ignores the unique nature of this project. Water Horse is not a water user, rather it plans to sell this water. It must divert at a constant rate to achieve the proposed yield of 55,000 acre feet. Any curtailment will decrease water deliveries and project revenue. Because Water Horse underestimates the time required to permit the project; underestimates project costs; and overestimates project revenues, it fails to demonstrate that this project is economically feasible.

The letters of interest included with Water Horse's Supplemental Letter only serve to undermine the Application. While there are a few recent letters of interest, the majority of them are old – from 2009 and 2010. Moreover, the letters only express interest in future water supply;

¹⁰ This 420-mile length is based on Exhibit F in Water Horse's Supplemental Letter.

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they are not water supply contracts. The letters underscore that Water Horse has no current customers and serve as a reminder that this Application is speculative and should be denied.

d. Financial Ability

Water Horse has not demonstrated the present financial ability to complete this project. Water Horse states that "it has received multiple offers for participation in the Project;" "expects to receive additional investment;" "is in ongoing discussions with a global investment bank;" and its member Arlo Richardson has a high net worth. Supplemental Letter, 11. Offers, discussions, and anticipated investment fall short of demonstrating capital available to invest in this project. Similarly, Mr. Richardson's wealth cannot be imputed to Water Horse. The most important part of Water Horse's response is what it doesn't say. Water Horse does not point to any capital that is currently available to fund this very expensive project.

Conclusion

For these reasons, the Upper Yampa District and Colorado River District respectfully request that the State Engineer deny this Application. The Districts reserve the right to raise additional objections to the Application, and to present additional facts and argument, as more information is provided by Water Horse and others.

Very truly yours,

Snell & Wilmer



Graham J. Gilbert

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